

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

**Complaint of Verizon Massachusetts
Concerning Customer Transfer Charges
Imposed by Broadview Networks, Inc.**

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D.T.E. 05-04

**REPLY BRIEF OF
BROADVIEW NETWORKS, INC.**

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Broadview Network, Inc.'s ("Broadview"), by undersigned counsel, hereby replies to the Initial Brief filed in the captioned proceeding by Verizon Massachusetts ("Verizon MA") in support of its Complaint challenging the lawfulness of Broadview's Service Transfer Charges. As Broadview will show below, Verizon MA, in its Initial Brief ignores key facts and misstates others, muddies the water with irrelevant arguments, mischaracterizes and misapplies pertinent statutory and case law, and manufactures ambiguities where none exist. In short, the various arguments offered by Verizon MA in support of its Complaint can and should be discounted.

**I. Verizon MA Ignores Record Evidence and
Misstates Key Facts**

In its Initial Brief, Verizon MA makes a number of bold statements that are not only not supported by, but are in direct conflict with, record evidence. For example, Verizon MA declares that "Broadview's Service Transfer Charges are triggered . . . not by any network facility or service that it provides to Verizon."¹ Verizon MA further asserts that "Broadview does not perform any tasks comparable to those for which

¹ Verizon MA Initial Brief at 2.

Verizon MA imposes Service Order or Manual Intervention charges.”² And Verizon MA opines that the tasks that Broadview must perform to facilitate the migration of a customer to Verizon MA are “essentially the same functions regardless of whether its customer transfers to Verizon MA or another carrier, dies, moves to another state, disconnects wireline service, or discontinues telephone service altogether without opening a new account with another carrier.”³ As Broadview showed in its Initial Brief, Verizon MA has repeatedly conceded otherwise in responding to various Broadview discovery requests.

As to Verizon MA’s last claim that Broadview performs “essentially the same functions” whether the customer migrates to Verizon MA or discontinues service without opening a new account with another carrier, Verizon MA, in responding to a Broadview discovery request that it “[c]onfirm or deny that when Verizon simply disconnects a customer by reason of the customer’s death, move to another state or otherwise, it does not: (i) request a [customer service record (“CSR”)] from any carrier; (ii) submit [a local service request (“LSR”)] to any carrier; (iii) contact any carrier to determine the status of the LSR which it has submitted; or (v) resubmit to any carrier an LSR rejected by the carrier as incomplete or inaccurate,”⁴ acknowledged that it “is able to disconnect its retail customer without interacting with another carrier, except where Verizon is releasing a telephone number that was ported to Verizon from another

² Verizon MA Initial Brief at 7.

³ Verizon MA Initial Brief at 12.

⁴ Verizon MA Exhibit No. 5.

carrier.”⁵ And in response to other Broadview interrogatories, Verizon MA further acknowledged that when it “wins” a customer from Broadview, it “[r]equest[s] . . . CSRs from Broadview and submit[s] . . . LSRs to Broadview,” contacts Broadview “to inquire about the status of the request,” and “correct[s] and resubmit[s]” LSRs when Broadview “rejects a Verizon LSR.”⁶

Verizon MA’s contention that “Broadview’s Service Transfer Charges are triggered . . . not by any network facility or service that it provides to Verizon”⁷ is no more supportable. As Verizon MA has conceded, when it migrates a customer from

⁵ Verizon MA Exhibit No. 5; *see also* Verizon Exhibit No. 3.

⁶ Verizon MA Exhibit No. 4; *see also* Verizon MA Exhibit Nos. 8, 10, 11. As the New York Public Service Commission recently found, “there are a number of functions that [Broadview] must perform solely in conjunction with a Verizon [NY] ‘winback’ that it does not perform when a customer simply disconnects service . . . [including] transmitting a CSR, . . . providing a CSR or circuit identification number to Verizon [NY], processing and verifying an LSR, performing queries associated with inaccurate or incomplete LSRs, issuing firm order commitment date[s], and responding to status requests.” *Complaint and Petition of Verizon New York Inc. Concerning Service Transfer Charges Imposed by Broadview Networks, Inc.* (Order Granting, in Part, Verizon New York Inc.’s Complaint and Petition on Broadview Networks, Inc.’s Customer Service Transfer Charges), Case 05-C-0066, p. 2 (NYPSC June 29, 2005) (“NYPSC STC Order”). *See also* Broadview Exhibit No. 1 at 11 (“There are a number of functions that Broadview performs for Verizon in conjunction with a Verizon “winback” that Broadview does not perform when a customer simply disconnects his or her service, either by reason of death, geographic relocation or otherwise. By way of illustration, when a customer simply disconnects his or her service, Broadview does not have to locate, retrieve and transmit a CSR. When a customer disconnects his or her service, Broadview does not have to receive, acknowledge and print LSRs, input into its system the 30 odd LSR information fields, and verify the completeness and accuracy of the information submitted. When a customer disconnects his or her service, Broadview does not have to place inaccurate or incomplete LSRs in jeopardy, query back to the submitting carrier for additional or corrected information, and process anew resubmitted LSRs. When a customer disconnects his or her service, Broadview does not have to issue a firm order commitment date (“FOC”) to the carrier. When a customer disconnects his or her service, Broadview does not have to respond to carrier status requests regarding pending LSRs. Each of these functions Broadview performs at the specific request, and for the direct benefit, of the carrier upon which Broadview assesses its Service Transfer Charges.”).

⁷ Verizon MA Initial Brief at 2.

Broadview, it requests that Broadview perform a variety of services for it. As described by Verizon MA, these services include:

Requesting a CSR from Broadview and submitting a LSR to Broadview is necessary when Verizon “wins” a customer from Broadview where Broadview used a Verizon UNE loop or used a ported number to serve the customer. The CSR provides, for example, circuit IDs, customer name and address, billing name and address, and existing call features. The LSR is necessary to instruct Broadview of Verizon’s intent to reuse the loop and release the telephone number if applicable. . . .

If there is no response received from the CLEC (*i.e.*, Broadview) within 48 hours after the submission of the LSR, Verizon will contact the CLEC to inquire about the status of the request. . . .

Although Verizon’s objective is to be accurate, errors may occur resulting in a rejection notice from the CLEC. If the CLEC rejects a Verizon LSR, Verizon will correct and resubmit the LSR in order to proceed with the migration process.⁸

Finally, Verizon MA’s assertion that “Broadview does not perform any tasks comparable to those for which Verizon MA imposes Service Order or Manual Intervention charges”⁹ simply does not square with the record. Set forth below in chart

⁸ Verizon MA Exhibit No. 4; *see also* Verizon MA Exhibit Nos. 8, 10, 11; Broadview Exhibit No. 1 at 7 - 8. As noted above, the NYPSC recently found that Broadview performed a number of services at Verizon’s request when migrating a customer to Verizon, including “transmitting a CSR, . . . providing a CSR or circuit identification number to Verizon [NY], processing and verifying an LSR, performing queries associated with inaccurate or incomplete LSRs, issuing firm order commitment date[s], and responding to status requests.” *NYPSC STC Order*, Case 05-C-0066 at p. 7. *See also* Broadview Exhibit No. 1 at 12 - 13 (“All of the functions described above – *i.e.*, the functions for which Broadview assesses a Service Transfer Charge -- are performed at the request, and for the direct benefit, of Verizon. It is Verizon that requests the CSR. It is Verizon that submits the LSR. It is Verizon that Broadview deals with when the information on the LSR submitted by Verizon is incomplete or inaccurate. It is Verizon that requests, and to whom Broadview provides, status reports regarding LSRs Verizon has submitted. And it is to Verizon that Broadview provides the FOC.”).

⁹ Verizon MA Initial Brief at 7.

form are the tasks whose costs are recovered by, respectively, Broadview's Electronic Processing and Manual Processing Service Transfer Charges and Verizon's Service Order Charge and Manual Intervention Surcharge.

Verizon Service Order Charge

**Broadview Electronic Processing
Service Transfer Charge**

“Receive Local Service Request (LSR) from the CLEC and print, review, type and confirm the order request”

Provide CSR at Verizon MA's request.

Receive LSR from Verizon MA and review for accuracy and completeness.

“Respond and/or change CLEC's pending Local Service Request.”¹⁰

Confirm LSR and issue firm order confirmation (“FOC”) or place LSR in jeopardy and return to Verizon MA.

Field status inquiries from Verizon MA.¹¹

¹⁰ Broadview Exhibit No. 2 at Non-Recurring Cost Testimony (at Exh. D, p. 1) submitted by Verizon Massachusetts (Cost Witness Bruce F. Meacham) in D.T.E. 01-20, *Investigation by the Department on its Own Motion into the Appropriate Pricing, Based upon Total Element Lone-Run Incremental Costs, for Unbundled Network Elements and Combinations of Unbundled Network Elements, and the Appropriate Avoided Cost Discount for Verizon New England, Inc. d/b/a Verizon Massachusetts' Resale Services in the Commonwealth of Massachusetts*, on May 4, 2001 (“Non-Recurring Cost Testimony”). See also Broadview Exhibit No. 2 at Non-Recurring Cost Model for Unbundled Network Elements (at Exh. A, p. 3) submitted by Verizon Massachusetts (Cost Witness Bruce F. Meacham) in D.T.E. 01-20, *Investigation by the Department on its Own Motion into the Appropriate Pricing, Based upon Total Element Lone-Run Incremental Costs, for Unbundled Network Elements and Combinations of Unbundled Network Elements, and the Appropriate Avoided Cost Discount for Verizon New England, Inc. d/b/a Verizon Massachusetts' Resale Services in the Commonwealth of Massachusetts*, on May 4, 2001 (“Non-Recurring Cost Model”) (“[T]he CLEC's service order requests are logged and assigned to a representative who examines the request for accuracy and verifies that the request contains all the information necessary to process the order. Errors and further queries related to the order are referred back to the carrier. Upon completion of the LSR review, the order is entered into the appropriate service order system. In addition, the TISOC corrects the order for any inaccurate or missing information and determines whether field surveys are required. The TISOC also issues the orders for termination of service.”).

¹¹ Broadview Exhibit No. 1 at 7.

**Verizon Manual Intervention
Surcharge**

Recovers “[t]he costs . . . of the activity required for a Verizon service representative at the TISOC to receive and translate a local service request (“LSR”) from a CLEC and to respond manually with a positive confirmation of order acceptance.”¹²

**Broadview Manual Processing
Service Transfer Charge**

Recovers the costs of the activity required for Broadview to manually retrieve and physically provide a CSR to Verizon MA, manually print an LSR from Verizon MA and key its contents into Broadview’s systems, and field calls from Verizon MA verifying Order status.¹³

As is readily apparent, Broadview’s Electronic Processing and Manual Processing Service Transfer Charges recover the costs associated with tasks which are not just comparable to those for which Verizon MA imposes Service Order Charges and Manual Intervention Surcharges, but which are virtually identical.

Verizon MA argues, however, that this near identity of tasks is irrelevant because the tasks performed by Broadview are not associated with additional services performed for Verizon. As explained by Verizon MA, its Service Order Charge and Manual Intervention Surcharge “are never applied on a stand-alone basis,” applying only when “a [competitive local exchange carrier (“CLEC”)] orders certain Verizon wholesale services (e.g., UNE loops, ports or switched interconnection services).”¹⁴

The transparent self-serving nature of this argument is manifest. Since in the Verizon MA/CLEC relationship, only Verizon MA provides wholesale services, applying Verizon MA’s Orwellian logic, Verizon MA would be permitted to recover the costs it incurred for activities performed at the request and for the benefit of CLECs, but CLECs would not be allowed to recover from Verizon MA the costs they incurred for

¹² Broadview Exhibit No. 2 at Non-Recurring Cost Testimony at 16; *see also* Verizon MA Exhibit No. 7.

¹³ Broadview Exhibit No. 1 at 5 - 6.

activities performed at the request and for the benefit of Verizon MA. And this would be true even if the activities performed and the benefits derived were identical.

A less level “playing field” would be difficult to imagine. The dominant carrier would be allowed to recover from its much smaller rivals the costs associated with any activity it performed at their request or for their benefit. This same dominant carrier would, however, be allowed to demand that those same smaller rivals perform services for it, and, as in this case, could gratuitously drive up their costs in so doing, without having to compensate them for their efforts. Moreover, as noted above, this would be true even if the services performed by Verizon MA and its competitors were identical.

The sole basis for this disparate treatment would be, according to Verizon MA, the “stand alone” nature of the competitor’s services as opposed to the “bundled” nature of Verizon MA’s services. The tasks performed could be the same. The costs incurred by the carrier performing the services could be the same. The benefit to the requesting carrier of those services could be the same. But because the services performed by CLECs were not provided in conjunction with other services, CLECs would not be allowed to recover the associated costs while Verizon MA would be permitted to do so.

The Department should decline to afford Verizon MA such a blatant competitive advantage and refrain from placing CLECs at such a gross competitive disadvantage. Verizon MA should be required to pay for services provided by CLECs at its request and for its benefit, just as CLECs are required to pay Verizon MA for services they receive from Verizon MA. Artificial distinctions designed to preclude CLECs from

¹⁴ Verizon MA Initial Brief at 6.

recovering the costs of services performed at the request and for the benefit of Verizon MA should be rejected out of hand.

As the record in this proceeding establishes, when imposed upon Verizon MA, Broadview's Service Transfer Charges recover costs incurred at the request and for the benefit of Verizon MA and hence are not only lawful, but, because they mirror charges levied on Broadview by Verizon MA for the performance of comparable tasks, are just and reasonable as well.

II. Verizon MA Muddies the Water with Irrelevant and Extraneous Arguments

Verizon MA offers up a host of arguments, which have no bearing on the matters at issue here. For example, Verizon MA emphasizes that “[t]he physical work of transferring the Broadview customer to Verizon MA’s switching facilities and establishing new service – i.e., physical cut-over, dial tone availability, and number porting -- is within the control of a single entity – Verizon MA, and is done entirely on Verizon MA’s network.”¹⁵ Broadview is not seeking to recover any costs associated with any of the activities Verizon MA has identified. As Broadview has made clear throughout this proceeding, its Service Transfer Charges recover the costs associated with the activities Verizon MA has acknowledged it asks Broadview to perform on its behalf and for its benefit in conjunction with the migration of customers from Broadview to Verizon MA.¹⁶ That Verizon MA performs additional tasks in conjunction with such migrations has no relevance here.

¹⁵ Verizon MA Initial Brief at 10.

¹⁶ Verizon MA Exhibit No. 4.

Verizon MA also asserts that “Broadview’s role in accommodating the desire of its former customer to transfer local service to another carrier is minimal, and thus incurs little or no associated costs.”¹⁷ As Broadview has shown, the activities Verizon MA requests Broadview to perform to facilitate the migration of customers from Broadview to Verizon MA – *i.e.*, responding to requests for CSRs, receiving and reviewing LSRs for accuracy, confirming LSRs and issuing FOCs or placing LSRs in jeopardy and returning them to the requesting carrier and fielding status inquiries – mirror the activities for which Verizon MA imposes a Service Order Charge and the activities in which Verizon MA forces Broadview to engage when it declines to use available electronic interfaces mirror the activities for which Verizon MA imposes a Manual Intervention Surcharge.¹⁸ Accordingly Verizon MA’s Service Order Charge and Manual Intervention Surcharge provide a good gauge of the costs incurred by Broadview. Whether the costs incurred are “little,” however, is irrelevant. Broadview is entitled to recover whatever costs it incurs at Verizon MA’s request and for its benefit.

Verizon MA identifies a number of functions -- “all of which relate to porting the customer’s telephone number” -- which it suggests Broadview performs in migrating a customer to Verizon MA – *i.e.*, “(1) perform switch line translation that allows completion of calls to the newly ported number without simultaneous disconnection of the number from the previous provider’s (Broadview’s) switch; (2) release the telephone number through NPAC the day before the due date for migrating the customer’s service to Verizon MA; (3) unlock the E911 database so that Verizon MA

¹⁷ Verizon MA Initial Brief at 10.

¹⁸ Broadview Exhibit No. 1 at 4 – 8.

can update the customer's information; and (4) remove the director listings" – and makes two points.¹⁹

First, Verizon MA declares that it does not charge Broadview for performing these services.²⁰ Then it declares that "Broadview is prohibited under federal law from recovering the costs for number porting activities associated with the relinquishment of a customer through intrastate Service Transfer Charges."²¹ As Broadview has repeatedly made clear, its Service Transfer Charges does not recover costs associated with any of the activities enumerated by Verizon MA, including "number porting activities associated with the relinquishment of a customer," and hence, once again, Verizon MA's arguments are not relevant to the lawfulness of Broadview's Service Transfer Charges.²²

Verizon MA next argues that the costs recovered by Broadview's Service Transfer Charges are "administrative tasks associated with closing out its customer service records for the departing retail customer" and hence are "fundamentally retail tasks."²³ Confirming this point, Verizon MA declares that "Broadview would have to perform essentially the same functions regardless of whether its customer transfers to Verizon MA or another carrier, dies, moves to another state, disconnects wireline service, or discontinues telephone service altogether without opening a new account with another

¹⁹ Verizon MA Initial Brief at 10 - 12.

²⁰ *Id.* at 11.

²¹ *Id.* at 11 - 12.

²² Broadview Exhibit No. 1 at 5 – 8, 16.

²³ Verizon MA Initial Brief at 12.

carrier.”²⁴ Finally, Broadview opines that “the sole necessary and sufficient cause of the costs is the customer’s decision to cease using Broadview as a service provider.”²⁵

Verizon’s contentions to the contrary notwithstanding, Broadview’s Service Transfer Charges, as Verizon has acknowledged in responding to Broadview discovery requests, recover the costs of services requested by and for the benefit of Verizon, not “tasks associated with closing out its customer service records for the departing retail customer.”²⁶ Moreover, as Verizon has acknowledged in responding to other Broadview discovery requests, the performance of these services is not necessary when a customer “dies, moves to another state, disconnects wireline service, or discontinues telephone service altogether without opening a new account with another carrier.”²⁷ Further, the “cause of the costs” of these services is not “the customer’s decision to cease using Broadview as a service provider,” but Verizon’s request for the services. Because the services for which Broadview levies a Service Transfer Charge are performed only when requested by Verizon to facilitate the migration of a customer to it, they are not “retail” service. And as Broadview pointed out in its Initial Brief, the NYPSC has so found, concluding that “there are a number of functions that [Broadview] must perform solely in conjunction with a Verizon [NY] ‘winback’ that it does not perform when a customer simply disconnects service . . . [including] transmitting a CSR,

²⁴ Verizon MA Initial Brief at 12.

²⁵ *Id.*

²⁶ See footnotes 8, *supra*.

²⁷ See footnote 4 - 5, *supra*.

. . . providing a CSR or circuit identification number to Verizon [NY], processing and verifying an LSR, performing queries associated with inaccurate or incomplete LSRs, issuing firm order commitment date[s], and responding to status requests.”²⁸

Finally, Verizon MA, applying “Alice-through-the-Looking-Glass” logic, declares Broadview’s Service Transfer Charges to be “anti-competitive” and designed to “penalize local exchange companies, such as Verizon, from competing successfully with Broadview.”²⁹ As the record makes clear, Broadview is simply attempting to recover costs incurred at the request and for the benefit of Verizon. – nothing less, nothing more. No penalty is involved when a service is requested and a charge for the requested service is assessed. What would be “anti-competitive” is to permit only selected carriers to recover for the performance of services requested by and benefiting competitors.

III. Verizon MA Mischaracterizes and Misapplies FCC and NYPSC Orders

Verizon wholly mischaracterizes the NYPSC’s recent ruling on Verizon New York’s (“Verizon NY”) complaint challenging the lawfulness of Broadview’s New York Service Transfer Charges – *i.e.*, the *NYPSC STC Order*. Verizon declares that in that order, the NYPSC applied “the same reasoning relied on in the Teleport Order, in which the NYPSC determined that costs associated with transferring customers to a competitor are not recoverable as wholesale charges, but are properly treated as retail costs.”³⁰ Nothing could be further from the truth. Verizon MA’s assessment

²⁸ *NYPSC STC Order*, Case 05-C-0066 at 7.

²⁹ Verizon MA Initial Brief at 13 - 14.

³⁰ *Id.* at 15.

notwithstanding, the NYPSC expressly rejected Verizon NY's argument that "customer service transfer costs should only be recovered in retail rates" and authorized Broadview to "introduce[e] a customer service transfer charge specifically designed to recover the costs of performing," among other things, "transmitting a CSR, . . . providing a CSR or circuit identification number to Verizon [NY], processing and verifying an LSR, performing queries associated with inaccurate or incomplete LSRs, issuing firm order commitment date[s], and responding to status requests."³¹

Verizon MA also badly mischaracterizes the *NYPSC STC Order* when it declares that the NYPSC expressed the belief that the costs of performing all of these various tasks "would be 'negligible'."³² What the NYPSC actually suggested was that the cost of a single task – *i.e.*, "the cost of a CSR" – might be negligible.³³ As to the costs associated with the other tasks, the NYPSC invited Broadview to file "cost data" justifying its Service Transfer Charges.³⁴

Verizon MA correctly assesses the *NYPSC STC Order* only when it points out that the NYPSC found that "the activities for which Verizon assesses service order charges and manual intervention surcharges are *not entirely comparable* to the costs that Broadview performs when it losses a customer to Verizon."³⁵ Unfortunately, the NYPSC, when it came to that conclusion, did not have the benefit of the Verizon MA

³¹ *NYPSC STC Order*, Case 05-C-0066 at 7.

³² Verizon MA Initial Brief at 15.

³³ *NYPSC STC Order*, Case 05-C-0066 at 7, fn. 5.

³⁴ *Id.* at 7 – 8.

³⁵ Verizon MA Initial Brief at 14 – 15 (*emphasis added*).

discovery responses in which Verizon effectively concedes that the activities are not only comparable, but near identical.

Verizon MA's reliance upon the NYPSC's *Teleport Order* can be wholly discounted.³⁶ The NYPSC, having noted Verizon NY's argument that "the Commission has already addressed the issue of customer service transfer charges when it granted a similar petition and complaint filed by Verizon against TC Systems, Inc. in February, 2004," concluded that Broadview's Service Transfer Charges presented a different circumstance.³⁷ Indeed, as noted above, the NYPSC authorized Broadview to implement charges to recover from Verizon NY the very costs Verizon had argued should only be recover in retail rates.

Verizon MA also is wrong in arguing that the Federal Communications Commission's ("FCC") "*Cavalier Virginia* Arbitration does not support Broadview's contentions." Verizon MA concedes that the FCC held that "[t]o the extent that Cavalier has demonstrated that it performs tasks comparable to those performed by Verizon, it would violate section 251(c)(2)(D) to allow Verizon to assess a charge on Cavalier but

³⁶ Verizon MA Initial Brief at 14 - 15.

³⁷ *NYPSC STC Order*, Case 05-C-0066 at 2 – 4, 7. As Broadview has previously explained, the decision of the NYPSC in *Complaint of Verizon New York Inc. Concerning Customer Transfer Charges Imposed by TC Systems, Inc.*, Case 03-C-0636 (the "*Teleport Order*") is inapposite here because it reflects an entirely different set of facts. The *Teleport Order* was issued in the context of a rate which mirrored Verizon NY's rates for performing hot cuts and was predicated upon a finding that it was Verizon NY that performed "the lion's share of the physical network activity necessary for a customer transfer." *Id.* at 5. The ruling further reflected the NYPSC's finding that the tasks the charging carrier performed in facilitating the transfer of a customer to Verizon NY were "not analogous to most of the tasks Verizon perform[ed]" in undertaking a hot cut. *Id.*

disallow a comparable charge by Cavalier on Verizon.”³⁸ Verizon MA further acknowledges that the FCC “found that Verizon’s UNE installation charge was a reasonable proxy for Cavalier’s winback costs because the winback functions performed by Cavalier are ‘similar in purpose and scope’ to the work that Verizon performs when it provides an unbundled loop for Cavalier customers.”³⁹ And Verizon MA concedes that the FCC “also determined that rates charged CLECs are presumptively reasonable where such rates do not exceed the ‘comparable’ rates charged by the incumbent.”⁴⁰

Verizon MA attempts to distinguish the FCC’s *Arbitration Order* by claiming that “Broadview’s charges are not ‘comparable to’ any Verizon MA charge.” But as Broadview has already demonstrated herein, the record shows otherwise. The tasks for which Broadview assesses Electronic Processing and Manual Processing Service Transfer Charges are not only comparable, but virtually identical, to the tasks for which Verizon MA levies Service Order Charges and Manual Intervention Surcharges. Accordingly, the FCC’s *Arbitration Order* is fully applicable here.⁴¹

³⁸ Verizon MA Initial Brief at 17; *In the Matter of Petition of Cavalier Telephone LLC Pursuant to Section 252(e)(5) of the Communications Act of Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc. and for Arbitration*, 18 FCC Rcd 25,887, ¶¶ 189, 203 - 205 (CCB released Dec. 12, 2003) (“*Arbitration Order*”).

³⁹ Verizon MA Initial Brief at 17; *Arbitration Order*, 18 FCC Rcd 25,887 at ¶¶ 189, 203 - 205.

⁴⁰ Verizon MA Initial Brief at 17; *Arbitration Order*, 18 FCC Rcd 25,887 at ¶ 205, fn. 679.

⁴¹ Verizon MA makes much of the fact that Broadview’s Service Order Charges apply on a per-line basis and Verizon MA’s Service Order Charges and Manual Intervention Surcharges apply on a per-order basis. As a practical matter, the distinction has little meaning because the average number of lines per Verizon “winback” order is 1.48. Broadview Exhibit No. 9. Broadview, however, would be willing to modify its Service Order Charges to apply on a per-order basis.

IV Verizon MA's Claimed Tariffing Ambiguities Do Not Exist

Verizon MA attempts to avoid payment of charges which it acknowledges have been lawfully tariffed since August 22, 2003 by manufacturing a host of “ambiguities” which it contends render Broadview’s Service Transfer Charges inapplicable to Verizon MA. Thus Verizon MA opines that “Broadview’s billing of Verizon MA is in conflict with its Access Tariff as a whole” because (i) the Tariff “applies to the Access Services furnished by Broadview Networks, Inc. between one or more points within the Commonwealth of Massachusetts,” (ii) “Verizon MA is not a ‘Customer’ of Broadview, as defined in Section 1.2 of Broadview’s Access Tariff,” and (iii) “Verizon MA does not ‘subscribe’ to any Broadview services in connection with service transfers.”⁴²

The “ambiguities” Verizon MA identifies exist only in its mind. “[T]ariffs having as they do the effect of law, the language in them must be construed fairly and reasonably, in accordance with the meaning of the words used, and not distorted or extended by forced or strained construction.”⁴³ Claimed ambiguities in tariffs “must have a substantial basis in the light of the ordinary meaning of the words used and not a mere arguable basis.”⁴⁴ “[T]he same fundamental canons of construction which apply to all regulations and statutes,” as well as contracts, apply to the interpretation of tariffs.⁴⁵ Thus, in addition to the requirement of rational construction, also applicable is “the

⁴² Verizon MA Initial Brief at 3 – 4

⁴³ *Western Grain Co. v. St. Louis-San Francisco Ry. Co.*, 56 F.2d 160, 161 (5th Cir. 1932).

⁴⁴ *United States v. Missouri-Kansas-Texas R. Co.*, 194 F.2d 777, 778 (5th Cir. 1952)

accepted principle that provisions under a specific tariff designation prevail over those included under a more general heading.”⁴⁶

That Verizon MA has strained and struggled to create an ambiguity is manifest. Verizon MA ignores altogether the clear language of the applicable provision which applies on its face to “requesting local exchange carriers” and manufactures a purported ambiguity by reference to the title page of the tariff and the definition of “Customer.” As is apparent, there is no “arguable basis” for an ambiguity here, much less a “substantial basis.” In arguing for an ambiguity, Verizon MA is proposing a “forced and strained construction,” not a fair and reasonable reading of the tariff. The “plain meaning” of the tariff is that local exchange carriers are required to pay for services provided by Broadview to facilitate the migration of customers to them.

Moreover, even the strained ambiguity Verizon MA claims fails with the application of the basic tenet of tariff construction that the “specific” prevails over the “general.” As noted above, Section 9.1 of Broadview’s M.D.T.E. Tariff No. 2 applies on its face to “requesting local exchange carriers.” The title page of the tariff and the definition of “Customer” – which is not used in Section 9.1 – are obviously the more general of the tariff provision over which the far more specific Section 9.1 prevails.⁴⁷

⁴⁵ *The Boston Phoenix, Inc. v. New England Telephone and Telegraph Co.*, 1996 Mass. Super. LEXIS 157 (1996).

⁴⁶ *Id.*

⁴⁷ Verizon also contends that it “does not ‘subscribe’ to any Broadview services in connection with service transfers.” Verizon MA Initial Brief at 4. As discussed previously, each time Verizon MA migrates a customer from Broadview to it, it requests that Broadview perform various services to facilitate that migration.

The Department should not sanction such a blatant attempt to avoid payment of lawfully tariffed charges.

**IV. Verizon MA Once Again Fails to Come Clean
With Regard to Its Gratuitous Imposition of
Additional and Unnecessary Costs on Broadview**

In its initial response to Verizon MA's Complaint, Broadview brought to the Department's attention the fact that Verizon had steadfastly and gratuitously refused to utilize Broadview's web-based interactive interface – the Broadview “Web Center” – to request CSRs and to submit and verify the status of LSRs. As of April 15 of this year – after Broadview had brought Verizon MA's refusal to interface with Broadview electronically to the Department's attention -- Verizon suddenly began using the Broadview Web Center. Just as steadfastly as it had refused to use the Broadview Web Center prior to April 15, however, Verizon MA now steadfastly declines to provide any meaningful justification for that refusal. Rather, Verizon MA continues to make misleading statements designed to gloss over what was a blatant effort to increase Broadview's cost of doing business.

In its Initial Brief, Verizon MA states that “it has worked with Broadview in an effort to establish electronic Verizon/CLEC interfaces that can accommodate the use of the Web Center.”⁴⁸ As Broadview has explained, the Web Center is a web-based interactive interface accessible via the Internet.⁴⁹ All Verizon needed to do to “accommodate use of the Web Center” was to secure a UserID and a Password from

⁴⁸ Verizon MA Initial Brief at 19.

⁴⁹ Broadview Exhibit No. 1 at 9.

Broadview and log on to www.broadviewnet.com/CLEC.⁵⁰ As evidence of the ease of “accommodate[ing] use of the Web Center,” roughly 90 carriers have secured UserIDs and Passwords from Broadview and made use of the Web Center.⁵¹

Verizon MA seeks to avoid the issue by arguing that “[t]he dispute over the use of the Broadview Web Center is irrelevant to, and provides no justification for, a Service Transfer Charge.”⁵² The imposition of additional and unnecessary charges resulting from the refusal of certain CLECs to utilize Verizon MA’s electronic interfaces was certainly relevant to Verizon MA when it established its Manual Intervention Surcharge, which applies when a CLEC declines to use available electronic ordering systems. Verizon’s insistence upon requesting CSRs and submitting LSRs and verifying their status manually was of no less relevant to Broadview.

As Broadview has recounted, Verizon MA’s refusal to use Broadview’s Web Center required Broadview to manually retrieve and physically provide to Verizon MA CSRs which Verizon MA could otherwise have viewed on-line through Broadview’s Web Center simply by clicking “CSR” and entering the required information. Verizon MA’s refusal to use Broadview’s Web Center further required Broadview to manually print LSRs and to key their contents into Broadview’s systems – tasks which would have been accomplished electronically if Verizon MA had used Broadview’s Web Center and simply clicked “LSR” and keyed-in the required information. Verizon MA’s refusal to use Broadview’s Web Center also required Broadview to field calls from Verizon MA

⁵⁰ Broadview Exhibit No. 1 at 9.

⁵¹ *Id.*

⁵² Verizon MA Initial Brief at 19.

verifying order status which status reports would have been available on-line simply by clicking “Review LSR” if Verizon MA had utilized Broadview’s Web Center. Moreover, these additional resource commitments were amplified each time Verizon MA modified - - either on its own accord or as a result of data flaws identified by Broadview -- or canceled an order, all of which could have been done on-line simply by clicking “Modify LSR” if Verizon MA had utilized Broadview’s Web Center.⁵³

Verizon MA has offered no credible explanation why it did not use the Web Center for the three years prior to April 15. Verizon Ma’s refusal to respond to inquiries,⁵⁴ in conjunction with the flimsy transparent excuses it has offered,⁵⁵ lead to only one conclusion. Verizon MA consciously elected to ignore the Web Center and to request CSRs and submit and verify the status of LSRs solely to cause Broadview to expend additional resources. And now Verizon MA wants to avoid reimbursing Broadview for those additional expenditures.

⁵³ Broadview Exhibit No. 1 at 10 - 11, Exh. 1.

⁵⁴ Verizon declined to respond to the following Broadview discovery request: “Has Verizon used the Broadview Web Center to request a CSR or to submit a LSR? If it has done so, (i) has it done so on a trial or on a commercial basis; (ii) over what period of time has it done so (a) on a trial basis and (b) on a commercial basis; and (iii) how many times has it done so (a) on a trial basis and (b) on a commercial basis and within what period of time and within what period of time (a) on a trial basis and (b) on a commercial basis within what period of time? If it has not done so, please explain why it has not done so. If you assert that Verizon has not used the Broadview Web Center to request a CSR or to submit an LSR because it was incapable of doing so, (i) detail why it was so incapable, (ii) indicate whether it is now capable, and (iii) if now capable, indicate when it became capable and why it is now capable?” Broadview Exhibit No. 5.

⁵⁵ Verizon alone among local exchange carriers operating in New York was purportedly incapable of accessing a web site via the Internet.

Verizon is flat wrong when it declares that this matter should be “addressed through business-to-business negotiations.”⁵⁶ Action by the Department is necessary here.

VI. CONCLUSION

By reason of the foregoing, Broadview once again urges the Department to deny Verizon MA’s Complaint with prejudice and to direct Verizon MA to pay the lawfully tariffed charges that it to date has unilaterally refused to do.

Respectfully submitted,

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⁵⁶ Verizon MA Initial Brief at 20.

CERTIFICATE OF SERVICE

I, Charles C. Hunter, do hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding in accordance with the requirements of 220 CMR 1.05(I) (Department's Rules of Practice and Procedure).

Dated at Valhalla, New York this 22nd day of July, 2005.

Charles C. Hunter

Counsel for Broadview Networks, Inc.